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Public Prosecutor v Aldwin Rojas Saz

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(SH)-598–12 OF 2017
ABDUL RAHMAN SEBLI, MARY LIM AND HASNAH HASHIM JJCA
8 JULY 2019

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Criminal Procedure — Defence — Insanity by reason of intoxication — Accused's abuse with methamphetamine caused temporary insanity during which time he murdered son and hurt wife with knife — Whether accused's inability to know what he was doing by reason of intoxication afforded him a complete defence to any criminal charge — Whether trial judge should have acquitted accused of the offences he was charged with and ordered him to be detained in safe custody pending further orders of the Ruler of the State in which the trial was held — Whether convictions made by trial judge against accused therefore null and void — Penal Code ss 84 & 85(2) — Criminal Procedure Code ss 347 & 348

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After having spent a full normal day with his wife ('Edwena') and eight-year-old son ('the deceased') at home and they had gone to sleep at night, the respondent suddenly awoke in the wee hours of the morning and in a fit of insanity stabbed his son to death and injured Edwena with a knife. The insane episode was caused by the respondent's abuse of the illicit drug, methamphetamine. The respondent was originally charged in the High Court with murdering his son and hurting Edwena but when the prosecution's evidence itself showed that the respondent did not have knowledge of what he was doing at the material time and was insane by reason of intoxication from the methamphetamine, the trial judge reduced the murder charge to culpable homicide not amounting to murder and, upon the respondent's plea of guilty thereto, convicted him of the charge and sentenced him to eight years' jail. The respondent was also sentenced to two years' jail and three strokes of the *rotan* for hurting Edwena. The appellant's complaint in the instant appeal was that the trial judge should have called on the respondent to make his defence to the murder charge as the prosecution had proven all the ingredients of that offence. In reply, the respondent submitted that since the trial judge had found as a fact that he did not know what he was doing when he committed the offences, he should have been acquitted and discharged of all the charges. The respondent asked the Court of Appeal to exercise its powers under the law to set aside his convictions and acquit him of all the charges.

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Held, acquitting the respondent of the original charges, affirming the trial judge's finding that the respondent had committed the acts stated in the

original charges and ordering that he be detained at Hospital Mesra Bukit Padang Kota Kinabalu pending further orders of the Yang di-Pertua Negeri of Sabah:

(1) The prosecution's concession at the trial (supported by expert medical evidence), that the respondent did not know what he was doing due to insanity by reason of intoxication from methamphetamine use, established the defence available to the respondent under s 85(2)(b) of the Penal Code. And when that defence was established, s 86(1) of the Penal Code provided that the provisions of s 84 of the Code and ss 347 and 348 of the Criminal Procedure Code shall apply. Accordingly, the trial judge should have acquitted the respondent of the original charges that he was charged with and ordered that he be kept in safe custody in such place and manner as the trial judge thought fit and thereafter reported the case for the orders of the Yang di-Pertua Negeri of Sabah. There was no necessity for the trial judge to have called upon the respondent to enter his defence to the two charges since both the prosecution and the defence did not dispute that the respondent was insane by reason of intoxication from methamphetamine use at the time the offences were committed. As the case fell under s 85(2)(b) of the Penal Code, the convictions that were made by the trial judge against the respondent were null and void (see paras 38, 42, 44, 48–50 & 54).

[Bahasa Malaysia summary

Setelah meluangkan sehari suntuk di rumah dengan isterinya ('Edwena') dan anak lelaki berumur lapan tahun ('si mati') dan mereka telah tidur pada waktu malam, responden tiba-tiba terjaga pada awal pagi dan dalam keadaan gila telah menikam anak lelakinya hingga mati dan mencederakan Edwena dengan pisau. Episod gila itu disebabkan oleh penyalahgunaan dadah haram oleh responden, iaitu methamphetamine. Responden asalnya didakwa di Mahkamah Tinggi kerana membunuh anaknya dan menyakiti Edwena tetapi apabila keterangan pendakwaan itu sendiri menunjukkan bahawa responden tidak mengetahui apa yang dia lakukan pada masa yang material itu dan dalam keadaan gila akibat di bawah pengaruh methamphetamine itu, hakim perbicaraan telah mengurangkan pertuduhan pembunuhan kepada mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang dan, atas pengakuan bersalah responden, telah mensabitkannya atas pertuduhan itu dan menjatuhkan hukuman penjara selama lapan tahun ke atasnya. Responden juga dijatuhi hukuman penjara dua tahun dan tiga kali sebatan kerana menyakiti Edwena. Aduan perayu dalam rayuan ini adalah bahawa hakim perbicaraan patut telah memanggil responden untuk membuat pembelaannya terhadap pertuduhan membunuh itu kerana pendakwaan telah membuktikan semua elemen kesalahan itu. Sebagai jawapan balasnya, responden telah berhujah bahawa oleh kerana hakim perbicaraan telah mendapati pada hakikatnya dia tidak mengetahui apa yang dilakukannya

ketika dia melakukan kesalahan itu, dia sepatutnya dibebas dan dilepaskan daripada semua pertuduhan itu. Responden memohon Mahkamah Rayuan menggunakan kuasanya di bawah undang-undang untuk mengetepikan sabitan dan membebaskannya daripada semua pertuduhan.

Diputuskan, membebas dan melepaskan responden daripada pertuduhan asal, mengesahkan dapatan hakim perbicaraan bahawa responden telah melakukan tindakan yang dinyatakan dalam pertuduhan asal dan memerintahkan agar dia ditahan di Hospital Mesra Bukit Padang Kota Kinabalu sementara menunggu perintah-perintah seterusnya daripada Yang di-Pertua Negeri of Sabah:

(1) Hujah pendakwaan semasa perbicaraan (disokong oleh keterangan perubatan pakar), bahawa responden tidak tahu apa yang dia lakukan kerana dalam keadaan gila oleh sebab di bawah pengaruh penggunaan methamphetamine, telah membuktikan pembelaan yang tersedia kepada responden di bawah s 85(2)(b) Kanun Keseksaan. Dan apabila pembelaan itu dibuktikan, s 86(1) Kanun Keseksaan memperuntukkan bahawa peruntukan s 84 Kanun Keseksaan dan ss 347 dan 348 Kanun Tatacara Jenayah hendaklah terpakai. Sehubungan itu, hakim perbicaraan patut telah membebaskan responden daripada pertuduhanan asal yang telah didakwa terhadapnya dan memerintahkan supaya dia ditahan dalam jagaan selamat di tempat dan cara sebagaimana hakim perbicaraan berpendapat adalah sesuai dan selepas itu melaporkan kes itu untuk perintah Yang di-Pertua Negeri Sabah. Tiada keperluan bagi hakim perbicaraan untuk memanggil responden memasukkan pembelaannya terhadap dua pertuduhan itu kerana kedua-dua pendakwaan dan pembelaan itu tidak mempertikaikan yang responden itu gila disebabkan di bawah pengaruh penggunaan methamphetamine pada masa kesalahan itu dilakukan. Oleh kerana kes ini terjatuh di bawah s 85(2)(b) Kanun Keseksaan, sabitan yang dibuat oleh hakim perbicaraan terhadap responden adalah terbatal dan tidak sah (lihat perenggan 38, 42, 44, 48–50 & 54).]

Notes

For cases on defence in general, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2191–2320.

Cases referred to

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

Tan Chor Jin v PP [2008] 4 SLR 306, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Criminal Procedure Code ss 180(3), (4), 347, 348, 348(1)
Evidence Act 1950 s 105
Penal Code ss 84, 85(2), 85(2)(b), 86(1), 302, 304(b), 324
Penal Code [SG] ss 84, 85(2)(b)
Rules of the Court of Appeal 1994 r 105

Appeal from: Criminal Trial No BKI-45B-2/11 of 2016 (High Court, Kota Kinabalu)

Muhammad Azmi bin Mashud (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hamid Ismail (Hamid & Co) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] This appeal by the public prosecutor was against the decision of the High Court amending the original charge of murder under s 302 of the Penal Code to a less serious charge of culpable homicide not amounting to murder under s 304(b) of the same Code and convicting the appellant of the lesser offence.

[2] The appeal concerns the procedure to be followed by the trial court where the defence of insanity by reason of intoxication under s 85(2)(b) of the same Code has been established by the prosecution's own evidence at the close of its case.

[3] After hearing arguments by both sides, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[4] In the High Court at Kota Kinabalu, the appellant was charged with two offences as specified in the following charges:

> First charge
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> That you, on the 18th day of February 2016, at about 2.00 a.m., in an unnumbered house, behind Kilang Papan Wangsa, in the district of Nabawan, in the State of Sabah, did commit murder by causing the death of one ROJAS JONVIN (Male/8 years old, Visaya PI) and that you have thereby committed an offence punishable under section 302 of the Penal Code (Act 574) of the Laws of Malaysia.
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> Second charge
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> That you on the 18th day of February 2016, at about 2.00 am, in an unnumbered house, behind Kilang Papan Wangsa, in the district of Nabawan, in the State of Sabah, did voluntarily cause hurt to EDWENA DOCA DAUD (Female/49, PASSPORT NO: VV0546742) by using dangerous weapon to wit a knife and that

you have thereby committed an offence punishable under Section 324 of Penal Code (Act 574) of the Laws of Malaysia.

[5] The first charge was for murdering his eight year old son whilst the second charge was for injuring his wife with a dangerous weapon. The first charge carries the death penalty on conviction whilst the second charge carries the penalty of imprisonment for a term which may extend to three years, or with fine, or with whipping or with any two of such punishments.

[6] At the close of the prosecution's case, the learned trial judge ruled that the prosecution failed to establish a prima facie case of murder as specified in the first charge but only succeeded in establishing a prima facie case of the lesser offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code.

[7] Accordingly, the learned judge amended the murder charge under s 302 of the Penal Code to a charge of culpable homicide not amounting to murder under s 304(b) of the Penal Code. The charge as amended by the learned trial judge reads as follows:

Bahawa kamu, pada 18hb February 2016 jam lebih kurang 2.00 pagi di dalam rumah tidak bernombor, di belakang Kilang Papan Wangsa, di dalam daerah Nabawan, di dalam Negeri Sabah telah menyebabkan kematian ke atas penama Rojas Jonvin (lelaki/8 tahun, Visaya PI) dengan mengetahui bahawa perbuatan kamu mungkin menyebabkan kematiannya dan dengan itu kamu telah melakukan kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(b) Kanun Kesiksaan.

[8] The offence on conviction carries an imprisonment term of up to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[9] The respondent pleaded guilty to the amended charge and was sentenced to eight years imprisonment backdated to his date of arrest on 18 February 2016.

[10] The reason why the learned trial judge amended the murder charge under s 302 of the Penal Code to the charge of culpable homicide not amounting to murder under s 304(b) of the same Code was because she found the respondent to be insane by reason of intoxication from methamphetamine use at the time he committed the act. This is what Her Ladyship said in her grounds of judgment:

[25] Therefore, the totality of evidence by PW3, PW4, PW6, PW7 and PW8

A revealed that the accused did not know what he was doing and he was insane by reason of intoxication from methamphetamine use at the time when he committed the murder and his actions against his own child was unintentional, without knowledge and with no motive.

B **[11]** As for the second charge of causing hurt with a dangerous weapon under s 324 of the Penal Code, the learned trial judge found that the prosecution had succeeded in establishing a prima facie case against the respondent and accordingly called for his defence to the charge.

C **[12]** The respondent pleaded guilty to the second charge and was sentenced to two years imprisonment with effect from the date of his arrest and three strokes of the *rotan*. The imprisonment sentence was ordered to run concurrently with the eight year imprisonment sentence for his conviction under s 304(b) of the Penal Code.

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[13] The background facts are as follows. The respondent, a 40 year old lorry driver for Kilang Papan Wangsa, Nabawan was living with his wife Edwena Doca Daud ('Edwena') and his son from a previous marriage by the name of Rojas Jonvin ('the deceased'), who was only eight years old at the time of his tragic death. The respondent and Edwena had been married for six years at the material time.

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[14] Nothing eventful happened on 17 February 2016. During lunch hour, the respondent and the deceased cleaned the 'Topikung' located at the backyard of their house and they also planted vegetables. After they were done with their chores, the respondent, Edwena and the deceased went to a nearby river to wash their clothes and took a dip in the river.

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G **[15]** When they returned home that evening, they took dinner together. Shortly after 8pm, the respondent went to their neighbour's house to watch television. The deceased and Edwena stayed in their own house and played handphone game called 'Candy Crush'. Later in the night the respondent returned home and joined the deceased and Edwena playing 'Candy Crush'.

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[16] What happened in the wee hours of the morning that followed turned their world upside down, with the deceased ending up being brutally murdered by his own father. This was Edwena's account of what happened:

I We were using our handphones. My son was also using his handphone. My husband was next to me teaching me how to play Candy Crush with my handphone. After that, he said let us go and sleep. I shared the mosquito net with my husband and my son has his own small mosquito net. I slept with my husband and my son has already gone to sleep. Suddenly my husband woke and stood up and mumbling words and his voice sounds different. I saw he was holding a knife, he was walking to and fro

and went straight to my son and my son was screaming 'mummy mummy'. I was so scared I closed my face with both hands and I don't know what happened. After that, I saw he was talking to the wall angrily and the moment I saw the door was ajar and I took the opportunity to run away and I escape to the bush, I fell asleep and the next day I realised I received a stab wound on my stomach.

[17] Apparently the respondent had, in a fit of insanity due to drug use, fatally attacked his son by slashing his neck and stabbing him twice in the chest with a knife. This must have been the moment when Edwena heard the deceased screaming 'mummy mummy'. But there was nothing she could do as she was frozen with fear by the respondent's terrifying act.

[18] When the police arrived at the scene at about 5 o'clock in the morning, the deceased was already dead. The post mortem that was conducted on his body by forensic pathologist Dr Jessie Hiu ('PW5') determined the cause of his death to be due to incised wound to the neck and two stab wounds to the chest. In her post mortem report (exh P39), PW5 confirmed that the injuries were sufficient in the ordinary course of nature to cause death.

[19] These injuries resulted in severe bleeding which led to hypovolemic shock and death. Photo No 12 of exh P42 shows the severity of the neck injury sustained by the deceased. It is obvious that his throat had been slit by the respondent. PW5 described the injury as follows:

3. An incised wound measuring 14 x 1.5 cm, oriented obliquely from the inferior surface of the chin at the midline to the lower right side of the neck, about 107 cm above heel. The underlying right sternocleidomastoid muscle and the lateral wall of the right jugular vein were cut.

[20] There were five other injuries inflicted on the deceased but they were not fatal. On the evidence, there can be no doubt that it was the respondent who caused the fatal injuries, even if we were to disregard his guilty plea to the amended charge under s 304(b) of the Penal Code.

[21] The contention by the prosecution was that the learned trial judge erred in finding that the prosecution failed to establish a prima facie case of murder against the respondent as charged. It was submitted that on the proved facts, all essential ingredients of the charge had been established, namely:

(a) the deceased had died;

(b) the deceased died as a result of the injuries sustained;

(c) the injuries were caused by the respondent; and

(d) that in causing the injuries, the respondent either:

(i) caused them with the intention of causing death;

(ii) caused them with the intention of causing such bodily injuries as the respondent knew to be likely to cause death; or

(iii) caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death.

[22] It was submitted that the learned trial judge should have called upon the respondent to enter his defence to the murder charge as required by s 180(3) of the Criminal Procedure Code ('the CPC') instead of amending the charge to a lesser offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code and to convict him of that offence. Section 180(3) of the CPC provides as follows:

> 180(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter his defence.

[23] As to what constitutes a prima facie case in criminal proceedings, the phrase has been given a statutory meaning by sub-s (4) of s 180 of the CPC, in the following terms:

> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[24] Thus, a prima facie case is established where the evidence is credible enough to warrant the accused's conviction if he fails to rebut or explain the evidence already established against him by the prosecution at the close of its case. If the accused chooses to remain silent or offers no evidence when called upon to state his defence, the court must proceed to convict him of the offence charged: *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 (FC).

[25] Learned counsel for the respondent however argued that not only had the prosecution failed to establish a prima facie case of murder under s 302 of the Penal Code against the respondent, but had also failed to establish a prima facie case even in respect of the amended charge of culpable homicide not amounting to murder under s 304(b) as well as the charge of causing hurt to Edwena by using a dangerous weapon under s 324 of the Penal Code.

[26] This, according to counsel, was because the learned trial judge had made a finding of fact that the respondent did not know what he was doing at the time he killed his son and injuring his wife. In the absence of such

knowledge, the respondent could not be guilty of any of the offences charged, ie murder under s 302, culpable homicide not amounting to murder under s 304(b) and causing hurt with dangerous weapon under s 324 of the Penal Code.

[27] For this reason, it was submitted that the learned trial judge was wrong to proffer the amended charge under s 304(b) of the Penal Code against the respondent and to call upon the respondent to enter his defence to the second charge under s 324 of the same Code.

[28] It was contended that the respondent should have been acquitted and discharged of both charges without his defence being called. For reasons that we shall give in a moment, we agree with learned counsel but only up to a point.

[29] It was contended that the learned judge's failure to direct her mind to the issue of knowledge in relation to the amended charge under s 304(b) of the Penal Code and to the charge under s 324 of the Penal Code constitutes a failure of justice warranting intervention by this court.

[30] We were invited to exercise our powers under s 60(1) of the Courts of Judicature Act 1964 and/or r 105 of the Rules of the Court of Appeal 1994 to set aside the respondent's convictions under ss 304(b) and 324 of the Penal Code and to acquit him of the charges. In other words, the respondent should be released forthwith.

[31] Learned counsel found support for his argument in the medical evidence that was adduced during the trial. The psychiatric report (exh P48) on the respondent which was produced by the prosecution (and not by the defence) under the heading 'SUMMARY, OPINION AND RECOMMENDATION' states as follows:

> 9.1 Mr Aldwin Rojas is a 40 year old Filipino man who was admitted to Hospital Mesra Bukit Padang on 16 February 2017 under Section 342(1) of the Criminal Procedure Code for a psychiatric evaluation and a report. He was charged under Section 302 of the Penal Code for allegedly murdering his 8 year old son named Janvin Rojas at Batu 47, Melampoi Nabawan on 17 February 2016.
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> 9.2 After several observation and assessments by the psychiatrist, medical officer and ward staff, we conclude that:
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> 9.2.1 Mr Aldwin is diagnosed to have Methamphetamine Use Disorder. Individuals who suffered from Methamphetamine Use Disorder might experience paranoia, auditory and visual hallucinations during intoxication and for a duration after that which may extend up to a few months. It is often self-limiting after cessation of the substance.
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> 9.2.2 However in the case of Mr Aldwin, we found that he had not experienced or

A reported any psychotic symptoms. He is not on any antipsychotic medications at the moment and is not suffering from a functional psychotic disorder.

9.2.3 Currently, in my opinion, he is fit to stand trial.

B **[32]** The psychiatrist who prepared the report was Dr Emmanuel Joseph Pereira ('PW7'). His expert testimony was that the use of methamphetamine, which is a psychotic drug, could lead to aggressive behaviour and this has been confirmed by a wide body of research. The following part of his evidence is relevant:

C In this case from the history we have obtained, Mr Aldwin Rojas was doing his normal routine activities just prior to the alleged incident. There could have been with reasonable certainty that at that point he might not have known what he was doing because of the influence of the psychotic drug. This was also evidenced in the police report that when they arrived to arrest him, he acted very violently and the D police needed to exert a certain amount of force to contain him.

[33] PW7 was asked in cross-examination if there might be high chances that at the time of the incident the respondent was not conscious of what he E was doing, and his answer was 'Yes, there might be a chance'. He was then asked in re-examination the percentage of chances that the respondent was not conscious of what he was doing that led him to kill his own son. This was his answer:

F I will give about 70 to 90%. There are papers and reports that methamphetamine is notorious for its association with violent behaviour, the violent behaviour was about 6 times more likely to occur than compared to those who did not use methamphetamine and it was dose dependent. If it was used less frequently for e.g. less than 15 days a month then the propensity for violent behaviour is 4 times more and if it is high use that is more than 16 days a month it is 15 times more likely. G During period of abstinence, there can be a 10% chance for violent behaviour as well. During heavy use the rate for violent behaviour can reach 60 to 70%.

[34] There was no evidence however to show how heavy or how frequent the respondent's use of the drug methamphetamine was prior to the incident. Be H that as it may, the investigation officer's ('PW6') evidence is telling. His testimony was that at the time of his arrest, the respondent was in a state of hallucination (*berkhayal*) and could not answer the questions posed to him by the police.

I **[35]** It was only after a few days later that the respondent became sober and could relate to what happened on the date of the incident. According to PW6, the respondent acted as if he had just awoken and only realised that he had killed his son after being told about it.

[36] The crucial part of PW6's evidence was that when the respondent was told that he had killed his son, his response was 'ya kah saya telah membunuh anak saya'. He did not cry but looked sad and was in a state of confusion.

[37] The evidence of Edwena also lent weight to the psychiatrist's evidence that the respondent did not know what he was doing when he killed the deceased and injured her. According to her, the respondent loved her and the deceased very much and she described him as a good husband, father and provider. He gave all his money to her and worked to support the family without any complaint and had never hurt her physically prior to the incident. It was the first time that he had acted so violently.

[38] At the trial, the prosecution conceded that the respondent did not know what he was doing and that he was insane by reason of intoxication from methamphetamine use disorder. Thus, it was the prosecution's own case that the respondent was insane by reason of intoxication at the time he committed the offences.

[39] Given the position taken by the prosecution, the learned deputy public prosecutor ('DPP') who conducted the prosecution at the trial understandably indicated to the learned trial judge that his prayer for an order that the respondent be called upon to enter his defence to the two original charges was with a view to proceeding under ss 347 and 348 of the CPC as provided by s 86(1) of the Penal Code.

[40] However, the learned judge did not accede to the learned DPP's request. Instead, as we mentioned, she proceeded to amend the murder charge and convict the respondent of the offence under s 304(b) of the Penal Code on his plea of guilty, and in respect of the charge under s 324 of the Penal Code, she called upon the respondent to enter his defence to the charge, to which the respondent also pleaded guilty.

[41] Subject to the conditions specified in s 85(2) of the Penal Code, intoxication is a defence to a criminal charge. The provision reads as follows:

> 85(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
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> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
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> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[42] Since the position taken by the prosecution (as supported by expert

A medical evidence) was that the respondent did not know what he was doing due to insanity by reason of intoxication, the case therefore stood to be decided on the basis that the defence under s 85(2)(b) of the Penal Code had been established at the close of the prosecution case.

B **[43]** There is a difference between the defence of unsoundness of mind under s 84 of the Penal Code and the defence of insanity by reason of intoxication under s 85(2)(b). This was explained by the Court of Appeal of Singapore in *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR 306 when dealing with ss 84 and 85(2)(b) of the Singapore Penal Code which are in pari materia with our corresponding provisions. This is what the court said:

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> 24 We are of the view that the two concepts — vis, unsoundness of mind in s 84 on the one hand and insanity by reason of intoxication in s 85(2)(b) on the other — are indeed different. One should not be too astute to attribute statutory superfluousness to Parliament where the use of the word 'insane' in s 85(2)(b) is concerned. Section 85(2)(b) refers to a different basis for exoneration from that afforded by s 84 as the former is grounded on intoxication-induced insanity. In contrast, the unsoundness of mind embraced by s 84 refers to an abnormal state of mind that covers diseases and deficiencies of the mind, both of which are invariably permanent conditions. The reference 'temporarily or otherwise' in s 85(2)(b) is neither accidental nor superfluous. These words do not refer merely to the temporary symptoms or effects of intoxication. Rather, they refer to an abnormal state of mind that can, inter alia, be transient. In short, s 85(2)(b) reinforces the point that an otherwise normal person can, under the influence of drink or drugs, become so intoxicated that he becomes legally 'insane'. This condition of insanity can be transient, as opposed to the unsoundness of mind envisaged in s 84, which must be permanent.

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[44] The procedure to be followed by the court where the defence of insanity by reason of intoxication under s 85(2)(b) of the Penal Code has been established is prescribed by s 86(1) of the Penal Code, which reads:

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> 86(1) Where the defence under subsection 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under paragraph (b), the provisions of section 84 of this Code, sections 347 and 348 of the Criminal Procedure Code [Act 593] shall apply.
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> (2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
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> (3) For the purpose of this and the preceding section 'intoxication' shall be deemed to include a state produced by narcotics or drugs.

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[45] By the terms of the provision, s 86(1) of the Penal Code must be read in conjunction with s 84 of the same Code and ss 347 and 348 of the CPC. Section 84 provides:

84 Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[46] Sections 347 and 348 of the CPC on the other hand provide as follows:

Section 347

347 Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Section 348

348(1) Whenever the finding states that the accused person committed the act alleged, the Court before which the trial has been held shall, if that act would, but for incapacity found, have constituted an offence, order that person to be kept in safe custody in such place and manner as the Court thinks fit and shall report the case for the orders of the Ruler of the State in which the trial is held:

Provided that if the Court concerned is a Magistrate's Court, the Magistrate may in his discretion, if he considers the offence charged is not of a serious nature and that the person can safely be released without danger to his doing injury to himself or any other person, caution and discharge him.

(2) The Ruler may order that person to be confined in a psychiatric hospital during the pleasure of the Ruler of the State.

[47] In the present case, there was no dispute that the appellant did the acts which he was charged with, ie killing his son and injuring his wife with a dangerous weapon as set out in the two charges.

[48] Having found that the respondent was insane by reason of intoxication from methamphetamine use when he committed the acts, what the learned trial judge should have done was to follow the procedure prescribed by s 348(1) of the CPC, which was to acquit the respondent of the two charges and to order that he be kept in safe custody in such place and manner as she thought fit and thereafter to report the case for the orders of the Yang di-Pertua Negeri of Sabah.

[49] There was no necessity for the learned judge to call upon the respondent to enter his defence to the two charges as urged upon by the learned DPP in his submissions at the close of the prosecution case, for the simple reason that the defence of insanity by reason of intoxication under s 85(2)(b) of the Penal Code had already been established, and in fact conceded by the prosecution.

[50] It is true that under s 105 of the Evidence Act 1950 ('the Evidence Act'), the burden was on the appellant to prove unsoundness of mind; but to call upon him to enter his defence on the murder charge merely to discharge his burden of proof would, in the circumstances, be a total waste of time, not to mention the futility of the exercise as both the prosecution and the defence did not dispute that the respondent was insane by reason of intoxication from methamphetamine use at the time he committed the offences. That burden had already been discharged at the close of the prosecution case by the prosecution's own evidence.

[51] The order for the respondent to enter his defence to the charges would be justified if there was no evidence of his mental condition at the prosecution stage of the case and the prosecution had proceeded on the basis that he was not insane within the meaning of s 85(2)(b) of the Penal Code at the time he committed the offences. In that event, the respondent would of course be given the liberty to call his own expert witness or witnesses to prove his defence of insanity. But that was not the case in the present appeal.

[52] Having said that, we must commend the prosecution for doing the right thing, which was to call expert medical evidence to show the mental state of the respondent at the time he committed the offences, instead of insisting that it was for the respondent to do so if and when his defence was called. This spared the respondent from having to discharge his burden of proof under s 105 of the Evidence Act.

[53] With regard to the learned judge's decision to amend the murder charge under s 302 to a charge under s 304(b) of the Penal Code and then proceeding to convict him of the offence on his plea of guilty, we find it to be an error in the face of her finding that although the respondent did commit the act complained of, but by reason of insanity due to intoxication from methamphetamine use, his act was covered by the defence under s 85(2)(b) read with s 84 of the Penal Code.

[54] No conviction should have been entered against the respondent for this offence and, for that matter, the offence under s 324 of the Penal Code notwithstanding the fact that he pleaded guilty to the charges. He should have been acquitted of both the murder charge and the charge under s 324 of the Penal Code as his case falls under s 85(2)(b) of the Penal Code. The convictions are therefore null and void.

[55] In the upshot, we allow the prosecution's appeal in part. We say in part because for the reasons we have given, we disallow the prosecution's appeal that the respondent be ordered to enter his defence to the original murder charge under s 302 of the Penal Code.

[56] We are only allowing the prosecution's appeal to set aside the order of the High Court amending the charge under s 302 of the Penal Code to the charge under s 304(b) and convicting the respondent of the offence under that section.

[57] As for the respondent's conviction under s 324 of the Penal Code, neither party appealed against the decision, although learned counsel for the respondent raised it in his submissions before us. In our view, since the conviction is a nullity, the conviction and sentence cannot be allowed to stand. We hope the sentence of three strokes of the *rotan* has not been carried out.

[58] For the avoidance of doubt, our decision is as follows:

(a) the order of the High Court amending the murder charge to a charge under s 304(b) of the Penal Code and convicting the respondent for an offence under that section upon his plea of guilty is set aside; and

(b) the order of the High Court calling for the respondent to enter his defence to the second charge under s 324 of the Penal Code and convicting him of the offence upon his plea of guilty is set aside.

[59] In substitution thereof, we order that the respondent be acquitted of the two offences he was originally charged with, ie the offence of murder under s 302 of the Penal Code and the offence of causing hurt by dangerous weapon under s 324 of the same Code.

[60] We however affirm the learned trial judge's finding that the respondent committed the acts complained of, ie causing the death of the deceased and causing hurt to Edwena by dangerous weapon. On the evidence before her, that was the only finding that was open to her to make.

[61] As a consequential order and pursuant to s 348(1) of the CPC, we make a further order that the respondent be released from prison forthwith and thenceforth be kept in the safe custody of Hospital Mesra Bukit Padang Kota Kinabalu.

[62] Finally, we order that the case be reported to the Yang di-Pertua Negeri of Sabah under s 348 of the CPC.

[63] As a post script, perhaps we could propose that in a situation such as this, where official medical evidence in the prosecution's possession affirmatively confirms that the accused person was insane and the prosecution accepts the fact that the accused was medically and legally insane at the time he committed the offence, the need to proceed with a full trial be dispensed with.

[64] What the prosecution could do perhaps is to apply to the trial court to straight away deal with the case under ss 347 and 348 of the CPC after the accused's plea has been taken. The facts tendered must of course state that the accused was medically and legally insane at the time he committed the act or acts. Alternatively, the CPC could be amended accordingly to deal with the situation.

Order accordingly.

Reported by Ashok Kumar